IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05/03/2003

CORAM

THE HON'BLE MR.JUSTICE E.PADMANABHAN

WRIT PETITION NO. 14672 of 1997
and W.P.Nos. 16587, 17001, 18745, 18746, 18118 to 18120,
18792 of 1997, 167/98, and 2992, 2993 of 2000

W.P.No:14672/97

Madras Steel Re-rollers Association
Regd.NO;97/1979
rep. by its President Sri Umesh Madan ..Petitioner

-Vs-

1.The Union of India
rep. by its Secretary to Govt.,
Dept of Revenue,
Ministry of Finance
North Block,
New Delhi.

2.The Central Board of Excise and Customs
North Block, New Delhi ..Respondents

Petition filed under Article 226 of The Constitution of India praying
for the issue of a writ of Declaration, as stated therein.

For petitioner:: Mr.K.Jayachandran
Mr.K.Kalyanasundaram
Mr.M.Muthappan

For respondents: Mrs.Pushya Sitaraman
and Mr.K.Veeraraghavan ACGSC

:O R D E R

In the above batch of writ petitions, W.P.No:14672 of 1997 has been
filed by Madras Steel Re-rollers Association, while the remaining writ
petitions have been filed by various individual steel re-rolling industries.
But the relief sought or are identical.

2. The petitioner in each of the writ petition has prayed for the
issue of a writ of Declaration declaring that Rule 5 of the Hot Rerolling
steel Mills Annual Capacity Determination (Amendment) Rules, 1997 inserted by

Notification NO.45/97-Central Excise (NT) dated 30 .8.197 as ultra vires and contrary to Section 3-A of the Central Excise Act, 1944 and Sub Rule 3 of the Said Rules in so far as the petitioner is concerned or in so far as the petitioners Association is concerned.

3. As the facts leading to the writ petitions and contentions are identical, the above writ petitions were consolidated and taken up for final disposal with the consent of either side.

4. The writ petitioners are rerollers and they manufacture M.S. Rods, Tor Steel, Angles, Channels, Flats, Squares etc., from ingots and billets. The product manufactured by the petitioners is an excisable commodity. Excise is a duty on excisable goods manufactured or produced in India and the Central Excise Act provides for charging of duty, valuation and other procedure for recovery. The rate of duty for excisable goods is notified under the Central Excise Tariff Act and Notification issued from time to time. The levy of excise duty is based on the manufacture and productions in actual and on the goods as per Section 3A of the Act. Section 3A confers the power for framing Rules for determining the annual capacity of production of the factory. The Hot Re-rolling Steel Mills Annual Capacity Determination Rules 1997 was framed by the Government of India in exercise of powers conferred by sub Section (2) of Section 3A. Rule 3 of the said Rules prescribes the method to determine the annual capacity of production by a formula, which annual capacity production has to be determined by the Commissioner of Central Excise. By a Notification No.25/97, dated 25.7.1997, Hot Re-rolling Sheet Mills Annual Capacity Determination Rule 1997 was introduced. The said Rule prescribes the formula for arriving/determining the annual capacity. After the introduction of Section 3A an assessee has to pay Excise duty on the annual production capacity so determined and arrived at basing on the formula prescribed under Rule 5 of the said Rules.

5. By Notification No.47/97 Central Excise (NT), dated 30.8.1997 the said Rule 5 was amended. The Rule as amended on 30.8.197 reads thus:- "In case the annual capacity determined by the formula in Sub-rule (5) of Rule 3 in respect of a Mill is less than the actual production of the Mill during the financial year 1996-97, then the annual capacity so determined shall be deemed to be equal to the actual production of the Mill during the financial year 1996-97."

6. The above rule is being challenged in this batch of writ petitions on the ground that it is violative of Art.14, it runs contrary to the statutory provisions of the Act and beyond the rule making powers as conferred by Section 3A of the Act, besides there are no guidelines or basis. It is also contended that Rule 5 goes contrary to the mandatory formula prescribed in Rule 3 and when the formula is prescribed for determining the annual production capacity, Rule 5 a deeming provision of 1996-97 is not at all relevant and basic concept itself is deviated. It is also contended that there cannot be two different types of levies in respect of the same materials when the object is to levy excise duty based on annual capacity and there cannot be any levy as per production.

7. On behalf of the respondent a counter affidavit has been filed contending that the rule impugned is valid, it does not run contrary to the statutory provisions and the contention to the contra are devoid of merits. It is also contended that the rule is not violative of Art.14. There is nothing in the Rule 5 which runs counter to the substantive provisions of the Act and therefore there are no merit in the contentions. It is also contended that being a taxation statute the Parliament has the authority to impose levy. It is contended by the learned Central Government Standing Counsel that the very provision has been upheld and therefore there are no merits. The respondent has also traced the history of legislation in this respect and also pointed out the necessity for introducing Section 3A and the consequential introduction of new rules which is warranted by the facts of the case. It is contended that the rule is neither ultra vires, nor it is liable to be declared as unconstitutional.

8. The learned Central Government Standing Counsel also contended that identical contention stands rejected by the Delhi High Court as well as Supreme Court of India and therefore no interference is called for. That apart, the Rule 5 which is being impugned is constitutionally valid and being a taxing statute and covering certain varieties of the items, it is not open to the petitioner to challenge the same.

9. The only point that arise for consideration is:
Whether Rule 5 of the Hot Re-rolling Steel Mills Annual Capacity Determination Rules 1997 is liable to be declared as unconstitutional, violative of Art.14 or runs counter to Section 3A of The Central Excise Act and the Rules framed thereunder?

10. The learned counsel for the petitioners took the court through Section 3A as was introduced on 25.7.1997 with effect from 1.8.1997, the Notification Nos:31/97, 32/97, 33/97 dated 1.8.1997 and 44/97, 45/97 dated 30th August 1997 and the notification which was being in force between 1.10.1997 and 31.3.2000 and came to be withdrawn from 1.4.2000. Rule 5 of the Hot Re-Rolling Steel Mills Annual Capacity Determination (Amendment) Rules 1997 was inserted by Notification No.4 5/97 CE (MT) dated 30.8.1997 and it is being impugned as ultra vires, unconstitutional, besides contrary to Section 3A of The Central Excise Act.

11. The substantial contention being that Rule 5 runs counter to the object and scope of Section 3A of The Central Excise Act and by the introduction of the Rule, the object and policy of the Act has been altered which is not permissible as the rule has been framed by the delegated authority and a delegated authority cannot overrun the Parliament by exercise of such rule making power. Rule 5, according to the petitioner creates discrimination among the identical or equally placed Steel Mills and therefore it is violative of Art.14 and introduces unreasonable classification which is violative of Art.14 and Art.19(1)(g) of The Constitution.

12. Section 3A prescribes the levy of Excise duty based on Annual capacity of production whereas Rule 5 prescribes the excise duty based on annual production of the mills during 1996-97 and for all the successive years

which is a contrary one. When there is a change in parameters, Rule 5 is not applicable. According to the learned counsel for the petitioner, Rule 5 creates a new disability by having a deemed retrospective operation and therefore it is beyond the rule making power of the Union of India.

13. The learned counsel on either side referred to the pronouncements of the Supreme Court in Union of India Vs. Supreme Steels and General Mills, reported in 2001 (133) ELT 513 (S.C). In the said case before the Supreme court the parties have accepted the validity of Section 3.A. The Supreme Court in the above pronouncement pointed out the settled legal position in Commissioner of Central Excise and Customs Vs. M/s.Venus Castings (P) Ltd., reported in 2000 (4) SCC 206 and held that as provided under section 3A(4) of the Central Excise Act and as provided under Rule 96ZO(3) of The Central Excise Rules, the alternative procedure and the option to be exercised by the assessee are valid.

14. In Commissioner of Central Excise and Customs Vs. M/s.Venus Castings (P) Ltd., reported in 2000(4) SCC 206, the Apex Court had occasion to consider the scope of Section 3A(4) of the Central Excise Act, determination of Actual Production and which determination of the duty liability according to the Central Excise Rules 1944 and also examined the question whether the rule is ultra vires to the Parent Act. In respect of Section 3A(4) of the Central Excise Act and Rule 9 6ZO(3) or Rule 96 ZP(3) of the Excise Rules, the Apex Court in the said pronouncement held thus:-
"11. The learned counsel for the respondent contended that Rule 96ZO(3) is contrary to Section 3-A(4) of the Act and, therefore, should be held to be ultra vires or the relevant rules should be read in such a manner so as to allow the procedure prescribed under the provisions of Section 3-A(4) to be followed. Section 3-A of the Act provides for levy and collection of the tax arising under the Act in such manner and at such rate as may be prescribed by the Rules. Section 3-A provides a special procedure in respect of the power of the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. If such interpretation is not accepted, it is contended, that the levy of tax is in the nature of a licence fee and not on the production of goods at all. Schemes of composition are available in several other enactments including the Sales Tax Act and the Entertainment Tax. (See State of Kerala v. Builders Assn. of India4.) In this context, the learned counsel for the respondents referred to several decisions. However, in our opinion, all these decisions either arising under the Income Tax Act in relation to special mode of collection of tax or excise duty on timber dealers or other enactments have no relevance. What can be seen is that the charge under the section is clearly on production of goods but the measure of tax is dependent on either actual production of goods or on some other basis. The incidence of tax is, therefore, on the production of goods. It cannot be said that collection of tax based on the annual furnace capacity is not relatable to the production of goods and does not carry the purpose of the Act. In holding a relevant rule to be ultra vires it becomes necessary to take into consideration the purpose of the enactment as a whole, starting from the preamble to the last provision thereto. If the entire enactment read as a whole indicates the purpose and that purpose is carried out by the rules, the same cannot be stated to be ultra vires of the

provisions of the enactment. Therefore, it is made clear that the manufacturers, if they have availed of the procedure under Rule 96-ZO(3) at their option, cannot claim the benefit of determination of production capacity under Section 3-A(4) of the Act which is specifically excluded. We find that the view taken by the Andhra Pradesh High Court in Sathavahana Steels & Alloys (P) Ltd. v. Govt. of India and a similar view expressed by the Division Bench of the Allahabad High Court in Civil Miscellaneous Writ Petition No. 1127 of 1999 Jalan Castings (P) Ltd. v. CCE3 disposed of on 28-2-2000 is reasonable and correct. We overrule the view taken by the Allahabad High Court in Pravesh Castings (P) Ltd. v. CCE.

12. On the reasoning adopted by us and bearing in mind that in taxation measures composition schemes are not unknown and when such scheme is availed of by the assessee it is not at all permissible for him to turn around and ask for regular assessment, we think, there is no substance in the contention urged on behalf of the respondents."

15. Applying the same test as laid down in Commissioner of Central Excise and Customs Vs. Venus Castings (P) Ltd., the contention advanced with respect to the validity of Rule 5, cannot be countenanced. Section 3 A of the Act enables the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. The intention or the reason for introduction of such a statutory provision in certain sectors like the Induction Furnaces, Steel Re-rolling Mills where there were large scale evasion of excise duty on such goods is substantial and the production is not disclosed accurately and as a result of which collection of duty on the basis of their production capacity was considered to be appropriate.

16. Under the scheme evolved in Section 3A the actual production capacity of mills and furnaces is determined by the Commissioner of Central Excise in terms of the Rules to be framed and thereafter the assessee would be liable to pay duty on such determination and thereafter the assessee would be liable to pay duty based on such determination. If the determination is disputed by the assessee, the Commissioner may be required to re-determine the same as provided in Section 3 A(4). In the said case before the Supreme Court, the rules were not challenged, but only their interpretation of the application were examined. While following the pronouncement of the Supreme Court in Commissioner off Central Excise and Customs Vs. Venus Castings (P) Ltd., this court while following the reasons as laid down by their Lordships hold that neither the rule runs counter to the object or intendment of the Legislature, nor it is contrary to Section 3A. Or any other provisions in the Act.

17. As regards the contention that the Rule is violative of Art.14 of The Constitution, in respect of fiscal legislation, namely levy of tax, discretion has been conferred with the Legislature in the matter of classification and courts will not normally interfere with a statutory discrimination if the set of facts justifies the same.

15. In State of Maharashtra Vs. Madhukar Balkrishna Badia, reported in 1988 (4) SCC 290, while examining the scope of Art.14, with reference to

Taxation law, the Apex Court held thus:-

"14. In this matter two principles have to be emphasised, firstly, that the tax must be regulatory and compensatory and secondly, there must be no discrimination. About discrimination it is well to remember that a taxation law cannot claim immunity from the equality clause in Article 14 of the Constitution. But in view of the intrinsic complexity of fiscal adjustments of diverse elements, a considerably wide discretion and latitude in the matter of classification for taxation purpose is permissible. See the observations of this Court in 1TO v. N. Takim Roy Rymbai. Also see the observations in Mrs Meenakshi v. State of Karnataka, Anant Mills Co. Ltd. v. State of Gujarat and Khandige Sham Bhat v. Agricultural Income Tax Officer8. The evidence on record shows that the life of motor cycles and tricycles normally exceeds 25 years. The so-called non-refund for certain period is not conclusive of the matter. Even if mathematical precision is not possible, we cannot say that it is wholly unmathematical. The collection of tax for a period of 15 years at one point of time is a convenient method enabling the owner to use the vehicle for more than 25 years, without having to visit the office to pay the tax periodically, and pay enhanced tax that may be levied during the 25 years of life of the vehicle. Regulatory and compensatory tax can be levied to the extent the State is required to pay for rendering the services. According to the State, the evidence on record shows that the cost of services is twice the total amount recovered from all types of vehicles. The balance of expenditure is met by the State from the general revenues. Even from this half collection, the motor cycles and tricycles contribute only 6.4 per cent. The percentage of motor cycles a nd tricycles is 56 to 5 8 per cent of all vehicles. Thus, even insubstantial increase in their rates cannot be said to be not a "regulatory or compensatory" tax measure.
15. The Act, as at present, is not violative of Article 14 of the Constitution. The fact that company-owned vehicles are taxed at three times the rate payable by individuals, does not make the legislation violative of Article 14. Historically, the company-owned vehicles have always been taxed at a rate higher than the individually-owned vehicles. As appears from the records produced, the motor cycles and tricycles constituting 56 to 58 per cent of all types of vehicles contribute only 6.4 per cent of the total revenue earned through the tax imposed by the Act. It is well settled that the legislature has the power to distribute tax burden in a flexible manner and the court would not interfere with the same. This principle has been reiterated in G. K. Krishnan v. State of Tamil Nadu2 where this Court observed that in the context of commercial regulation, Article 14 is offended only if the classification rests on grounds wholly irrelevant to the achievement of the objective and this lenient standard is further weighted in the State's favour by the fact that a statutory discrimination will not be set aside if a state of facts may reasonably be conceived by the court to justify it. Tax laws have to respond closely to local needs and court's familiarity with these needs is likely to be limited. Therefore, the court must be aware of its own remoteness and lack of familiarity with the local problems. Classification is dependent upon peculiar needs and specific difficulties of the community. The needs and the difficulties of a community are constituted out of facts and information beyond the easy ken of the court."

In the light of the above pronouncements, the substantial contention of discrimination and violation of Art.14 cannot be countenanced.

18. The impugned Rule was operative for a limited period only and it is no longer in force. The learned counsel for the petitioner sought to rely upon the pronouncement of the Supreme Court in Rattan Arya Vs. State of Tamilnadu(1986 (3) SCC 385), Assam Company Ltd., Vs. State of Assam (AIR 2001 SC 1485) and State of Himachal Pradesh Vs. Nurpur Private Bus Operators Union (1999 AIR SCW 3964). The above pronouncements relied upon by the counsel for the petitioner has no application, nor they have bearing and in those pronouncements it has been held that differential treatment has been held to be arbitrary. But in this case, in respect increase which fall under section 3A read with Rule 5, which is a category or classification by itself and a separate procedure of assessment alone has been provided for and not in the levy or rate of levy. Section 3A itself enables the Central Government to charge Excise duty on the basis of their production capacity as appropriate as there were large scale evasion of excise duty. Therefore Rule 5 has been introduced and if the petitioners have any grievance in respect of determination on facts of each case the petitioners could seek for re-determination as the rule provides for. What is contemplated or taken care of by the Rule is when the annual capacity determined by the formula in sub rule (3) of Rule 3 in respect of a Mill, is less than the production of the mill during the financial year 1996-97, for the next financial year, annual capacity so determined shall be deemed to be equal to the actual production of the mill during the financial year 1996-97. This is a statutory fiction which the Parliament is competent to enact has introduced such a fiction and there is no discrimination in it. The Hot Re-rolling Steel Mills Annual Capacity Determination Rules 1997 not only provides a specific rule or special procedure for the particular type of industry, but also enable either to adopt the formula or to go by the guidelines which is in no way violative of Art.14 or any other constitutional provisions. Rule 5 in no way runs counter to Section 3A and such a contention cannot be sustained.

19. In Kamkhya Steels (P) Ltd., Vs. Union of India, reported in 200 2 (143) ELT page 38, a Division Bench of the Delhi High Court on the identical issue held thus:-
"7. Section 3A of the Act permits assessment of duty on the basis of production capacity. Section 3A(4) of the Act provides for reduction of duty in case of actual production being lower than the capacity under Section 3A(1). The rationale behind these sections has been gone into and approved by the Supreme Court in the case of Venus Castings where it has been held as follows:
"What can be seen is that the charge under the section is clearly on production of the goods but the measure of tax is dependent on either actual production of goods. It cannot be said that collection of tax based on the annual furnace capacity is not relatable to the production of goods and does not carry the purpose of the Act."

8. Rule 96ZO provides for the measure of excise duty for manufacture of alloy steel ingots and billets. Under Rule 96ZO(1) the manufacturer has to pay Rs.750/= per metric ton of capacity of production. Alternatively the

petitioners opt for the procedure under Rule 96ZO(3) whereby a manufacturers having a total furnace capacity of 3 metric tons may opt to pay a sum of Rs.5 lacs per month instead of the liability under Rule 96ZO(1), in that case he will not avail of the benefit under Section 3A(4) o the Central Excise Act. These two procedures namely under Rule 96Z)(3) and Section 3A(4) have been held to be alternative to each other and it has been held that once a manufacturer has opted for the procedure under Rule 96ZO(3), he cannot avail the benefit of Section 3A(4) even if his liability under the actual production measure is less."

20. In Commissioner of Central Excise, Jaipur-II, Vs. SPBL Ltd., reported in 2002 (146) ELT 254 (S.C) the Apex Court held thus:-

"4. We are not referring to other parts of the Rules, 1998 as we are concerned only with the aforesaid Rules 3(1), 3(3) and Explanation-I to Rule 5. Explanation-I to Rule 5 is to the following effect:-

"Explanation-I: For the purposes of this notification, a float drying machine or any other equipment of a length 3.05 metres installed in or attached to a stenter for aiding the process of heat setting or drying of the fabrics shall be deemed to be one chamber of a stenter and any fraction of such length shall be computed on pro rata basis."

The aforesaid Rules were supersded by the "hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 2000 which acame into force from 1st day of March, 2000. In the said Ruels, there are ;no major changes except Explanation-I to Rule 5 which clarifies that the galleries installed in or attache to a stnter shall not be deemd to be one chamber of a stenter. Explanation-I to Rule5 is as under:-

"Explanation-I: For the purposes of this notification, a float drying machine or any other equipment, except the galleries, of a length 3 .05 metres installed in or attached to a stenter for aiding the process of heat setting or drying of the fabrics shall be deemed to be one chamber of a stenter and any fraction of such length shall be computed on pro rata basis."

The aforesaid Explanation makes it clear that the galleries are required to be excluded while taking into consideration the flat drying machines or any other equipment which is installed in or attached to a stenter for aiding the process of heat setting or drying of the fabrics."
xx xx xx xx
11. It is to be stated that in exercise of the powers conferred under Section3 3A of the Act, the 1998 Rules were framed, which came into force on 10th December, 1998. Those Rules were framed, which came into force on 10th December, 1998. those rules were superseded by the Rules, 2000, which came into effect from 1st March, 2000. As such, there is not much difference between these Rules. The aforesaid Rules are also deleted from 1st march 2000 and no new Rules were framed. Thereafter, Section 3A which was inserted in 1997 itself stood omitted by Act 14/2001. So, at present neither the relevant provisions nor the Rule;s are in existence. In this view of the matter the contention raised by the learned Attorney General does not required much

consideration....."

21. While respectfully following the said pronouncement, this court holds that all the points advanced by the learned counsel for the petitioners deserve to be rejected. This court holds that the rule in no way runs counter to Section 3A and that being a fiscal provision as laid down by the Supreme Court, it is not violative of Art.14 or 19 (1)(g).

22. In the foregoing circumstance, the point is answered against the petitioners and in favour of the respondents. All the writ petitions are dismissed. No costs.

Internet:yes

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